

**Family****The mediation brief: A primer | AJ Jakubowska**By **AJ Jakubowska**

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(July 19, 2021, 1:27 PM EDT) -- Family mediation is in the spotlight again and that is a very good thing. Any dialogue about this important modality for resolving family law disputes is welcome — and since I firmly believe that heterogeneity of ideas enriches dialogue, I read with interest the friendly debate taking place on the pages of this very publication.

I applaud my colleagues in the family law and family mediation fields for their spirited, and perhaps even impassioned, contributions so far. I am going to leave to them further pursuit of the subjects of standardized mediation training, accreditation, best practices and screening. There is plenty of room for discussion, exploration and innovation.

I put this piece together for another, albeit related, reason — I receive many questions about family mediation from new family law lawyers. With the amended legislation now imposing heightened obligations on us all to actively talk to our clients about family mediation, and to use it to attempt to resolve our clients' disputes, they have questions — many questions.

I have been asked how an actual mediation unfolds, from a practical, ground-level perspective, and how virtual mediations differ from those conducted in person. There was a question about how a successful mediation ends; in other words, what document is signed, if any, and what role the parties' lawyers play in finalizing any settlement.

To the seasoned family law lawyers among us, answers to such queries may be obvious but imagine you are new to family law — this information is fundamental to understanding the process and, importantly, incorporating it effectively into the everyday practice of family law. Such questions need to be answered, and actively so.

In a recent mentorship session, we discussed possible contents of a mediation brief; to help the mediator understand the facts, the parties' positions and interests. Queries I continue to receive tell me new lawyers need resources to answer their basic questions about family mediation. While there are mediation courses out there, these are designed primarily for those interested in assuming the role of a mediator. It may be time to consider something for new family law lawyers.

Picking up on the discussion about mediation briefs, new lawyers, here is what you might consider when preparing your client's brief:

1. Imagine for a moment that you are actually the mediator facing this dispute. What information/documentation/calculations would help you in advance of the mediation session to hit the ground running and go straight into the actual negotiations? The parties' time and resources are best spent on using the mediator's actual skills, not on having them trying to "figure out the case" during the mediation session. Ask: what would I want to see/read before the mediation to really have a grasp of what is at issue?

2. Do not approach your mediation brief with the "I'll let the mediator figure that out" attitude. Do the opposite, in fact. The more practical tools you give her in advance of the actual mediation session, the better.

Deconstructing the issues to their granular level is helpful to the mediator. SupportMate calculations

are a classic example. I have received mediation briefs in the past that raised support issues but did not make reference to potential scenarios; they did not attach SupportMate calculations at all. Is including them essential? No, but it does help.

Someone will have to do the calculations. You should. The alternative is that your client pays the mediator to prepare them or that the mediator has only those prepared by the other side. Neither scenario is ideal.

Net Family Property Statements are another example. We are now moving into the "essential" territory. I have even seen briefs that included an NFP comparison prepared jointly by counsel — with commentary on their clients' respective positions — a bonus when it comes to the mediator's preparations for the actual negotiations. We mediators are happy to do the ground work but where resources are limited, calculations and scenarios are best prepared at the lawyer level, not to mention that they will give you a firmer grasp on your own client's case.

3. Consider attaching your client's offer(s) to settle but before you do, consider whether the mediation is open or closed. If no formal offers have been made, include in your brief terms on which your client would be prepared to reach resolution, at least their starting position. Such content helps the mediator understand the "delta" — in other words, how apart the parties are and on what issues. It helps her crystallize the dispute and, in turn, strategize about the order in which the issues will be tackled and how.

4. Do not forget you are not advocating. The mediator is not a decision maker. She is a neutral participant in the dialogue — a facilitator of it, based on her unique skills. The language of your brief should be focused, accessible and designed to maximize chances of settlement. Just like in court materials, finger-pointing, blaming and inflammatory language are not only unhelpful, they might actually douse the embers of potential settlement.

*New lawyers:* In your horizontal mentoring relationships, with your peers, share your actual experiences with family mediation. Ask your vertical, more experienced mentors questions about it.

*Seasoned practitioners:* Modern family lawyering has moved well beyond advocacy — an overdue development. Those more seasoned among us, lawyers and mediators, should actively help new lawyers make family mediation part of their everyday vocabulary and practice.

*AJ Jakubowska is a family law lawyer, family mediator and podcaster in Newmarket, Ont. She is also a founding member of the York Family Resolution Centre.*

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